Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor

FEDERAL COURT — CIVIL APPEAL NO 01(F)-1 OF 2008 (A)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND JAMES FOONG FCJJ
1 OCTOBER 2010

Tort — Negligence — Adjoining properties — Collapse of hill causing damage to plaintiff's nursery — Two or more causes contributing to plaintiff's loss — Causation — Whether established — Whether 'but for' test appropriate test — Whether vibration caused by quarry operations materially contributed to rockfall — Duty of care — Whether first defendant ought reasonably to have plaintiff in contemplation when operating quarry in hill — Breach of duty — Whether standard of care that of professional quarry operator — Independent contractor — Whether second defendant liable for acts of first defendant

The plaintiff was the owner of a plant nursery situated on a piece of land in Perak ('the plaintiff's land'). The plot of land adjacent to the plaintiff's land, which had a natural limestone hill, was owned by Darus bin Mohd Said ('the second defendant'). The second defendant had leased his land to the first defendant for the purpose of operating a quarry. The Director of Lands and Mines in Perak ('the third defendant') had granted the first and second defendants a licence to operate a quarry on the second defendant's land. On 29 December 1987, following a heavy downpour a large slice of the hill atop the second defendant's land collapsed causing limestone debris to fall onto the plaintiff's land below and thereby destroying a large part of the plaintiff's nursery. The plaintiff claimed that the damages caused to his land and the nursery situated thereon was caused by the quarrying activities of the first and second defendants, which had been permitted by the third defendant. He commenced an action in negligence and nuisance against all the defendants. All the three defendants denied liability and the second defendant also pleaded in the alternative that the injury suffered by the plaintiff was caused by the negligence of the first defendant who was an independent contractor engaged by him to operate the quarry. The plaintiff's expert witness attributed the cause of the collapse of the hill to a force known as rockburst, which was caused directly by the quarry operation carried out by the first defendant. The first defendant called two experts to dispute the theory put forward by the plaintiff's expert. According to the first defendant's two experts the collapse of the hill was primarily due to natural causes such as the long term process of denudation or weathering on the limestone hills rather than a rockburst. The trial judge after applying the 'but for' test to determine liability found that the effective cause of

the damage to the plaintiff's land was not the quarry operations. He then proceeded to determine whether the first defendant had breached its duty of care to the plaintiff, on the assumption that the effective cause was established, and found that there was no such breach by the first defendant. The trial judge also dismissed the cause of action in nuisance against the first defendant. As the second defendant was not the occupier of the land at the material time, the High Court also dismissed the plaintiff's claim against the second defendant. Thus, the High Court held that the defendants were not liable for the damage caused to the plaintiff. The Court of Appeal affirmed the decision of the High Court and hence the present appeal. In this appeal the plaintiff submitted that the trial judge had applied a wrong principle of law regarding the causation of the damage suffered by the plaintiff. The plaintiff further submitted that when there were overlapping factors, such as in the instant case, the 'but for' test should not be applied. It was the first defendant's contention that although there were several factors contributing to the rockfall, the plaintiff had failed to identify quarrying by the first defendant as the material cause for the damage caused.

Held, allowing the appeal against the first defendant with costs here and below and dismissing the appeal against the second defendant with costs:

(1) In the light of the authorities, it was clear that the 'but for' test was not the exclusive test to be applied to determine causation of the damage or injury. It could be applied but not to cases when there are two or more factors that could contribute to the injury of the plaintiff. The instant case was a case in point where evidence was established that there were a multiple of factors that could bring about the injury to the plaintiff. Thus, to decide whether there was causation in these circumstances, the approach as to whether any of these acts or events or factors had materially contributed to the plaintiff's injury should be adopted. In the present case, although the vibration caused by the quarry operations that were carried out by the first defendant was not a primary cause, it had over time materially contributed to the rockfall which caused the plaintiff's injury. As such this factor was neither trivial nor insignificant but instead a cause which materially contributed to the rockfall (see paras 36–38).

(2) On the facts of this case it was clear that the plaintiff was so closely and directly affected by the first defendant's act that the latter ought reasonably to have the plaintiff in its contemplation when operating the quarry. Having established that the first defendant owed the plaintiff a duty of care, it became necessary to determine whether the first defendant had breached that duty. The trial judge had erred on both principle and application of facts when he equated the first defendant to a professional and applied the standard of care required of a professional quarry operator and then went on to conclude that despite the shortcomings of

the first defendant as a quarry operator there was no breach of his duty of care. On the present facts the first defendant was not a professional because there was no evidence that he possessed such skill. As such, it followed that the standard of care required was that of a reasonable and prudent man and whether he considered the activities carried out by the first defendant as a breach of its duty of care to the plaintiff. In the instant case it was found that despite overwhelming evidence the trial judge refused to come to a finding that the first defendant had breached this duty of care and this was a misdirection on the facts. The blasting operation carried out by the first defendant had caused vibrations and though this was one of the causes for the rockfall it was a significant contribution to the collapse of the hill. Thus on these grounds the first defendant was liable to the plaintiff for negligence (see paras 39–46).

(3) The second defendant had passed away and there were no steps taken to substitute the second defendant in the proceedings. However, even if there was such a substitution the second defendant could not be held liable for the damages suffered by the plaintiff because the first defendant was an independent contractor of the second defendant (see paras 47–49).

[Bahasa Malaysia summary

Plaintif adalah pemilik tapak semaian tanaman yang terletak di sebidang tanah di Perak ('tanah plaintif'). Plot bersebelahan dengan tanah plaintif, yang mana terdapat bukit batu kapur semula jadi, dimiliki oleh Darus bin Mohd Said ('defendan kedua'). Defendan kedua menyewakan tanahnya kepada defendan pertama untuk tujuan menjalankan kerja-kerja menguari. Pengarah Tanah dan Lombong di Perak (defendan ketiga') telah memberikan defendan pertama dan kedua lesen untuk menjalankan aktiviti menguari di atas tanah defendan kedua. Pada 29 Disember 1987, berikutan hujan lebat, bongkah besar atas bukit tanah defendan kedua runtuh menyebabkan serpihan batu kapur jatuh ke atas tanah plaintif di bawahnya dan memusnahkan sebahagian besar tapak semaian plaintif. Plaintif mendakwa bahawa kerosakan yang berlaku ke atas tanahnya dan tapak semaian yang terletak di situ adalah disebabkan oleh aktiviti menguari defendan pertama dan kedua, yang telah dibenarkan oleh defendan ketiga. Dia memulakan tindakan kecuaian dan kacau ganggu terhadap kesemua defendan. Ketiga-tiga defendan menafikan liabiliti dan defendan kedua juga memplid secara alternatif bahawa kerosakan yang dialami plaintif adalah disebabkan kecuaian defendan pertama yang merupakan kontraktor bebas yang dilantik olehnya untuk menjalankan kerja-kerja kuari. Saksi pakar plaintif menyatakan sebab keruntuhan bukit kepada suatu kuasa yang dikenali sebagai ledakan batu, yang disebabkan secara langsung oleh operasi kuari yang dijalankan oleh defendan pertama. Defendan kedua memanggil dua orang pakar untuk mempertikaikan teori yang dikemukakan pakar plaintif. Menurut dua pakar defendan pertama keruntuhan bukit

tersebut pada asasnya disebabkan oleh sebab-sebab semula jadi seperti proses jangka panjang penggondolan atau luluhawa ke atas bukit batu kapur daripada ledakan batu. Hakim bicara selepas mengaplikasi ujian 'but for' untuk menentukan liabiliti, mendapati bahawa sebab efektif kerosakan kepada tanah plaintif bukan kerana operasi kuari. Beliau seterusnya mempertimbangkan sama ada defendan pertama telah memungkiri kewajipan berjaga-jaga terhadap plaintif, atas anggapan bahawa sebab efektif telah dibuktikan, dan mendapati bahawa tidak ada kemungkiran sedemikian oleh defendan pertama. Hakim bicara juga menolak kausa tindakan dalam kacau ganggu terhadap defendan pertama. Oleh sebab defendan kedua tidak menduduki tanah tersebut pada masa material, Mahkamah Tinggi juga menolak tuntutan plaintif terhadap defendan kedua. Oleh itu, Mahkamah Tinggi memutuskan bahawa defendan-defendan tidak bertanggungjawab terhadap kerugian yang dialami oleh plaintif. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan maka rayuan ini. Di dalam rayuan ini plaintif menghujah bahawa hakim bicara telah menggunakan prinsip undang-undang yang salah berkaitan dengan sebab kerugian yang dialami oleh plaintif. Plaintif selanjutnya menghujah bahawa apabila terdapat faktor-faktor yang bertindih, seperti di dalam kes ini, ujian 'but for' tidak wajar digunakan. Adalah hujahan defendan pertama bahawa walaupun terdapat beberapa faktor yang menyumbang kepada tanah runtuh, plaintif telah gagal untuk mengenal pasti kerja-kerja kuari oleh defendan pertama sebagai sebab utama kerosakan yang dialami.

Diputuskan, membenarkan rayuan terhadap defendan pertama dengan kos di mahkamah ini dan Mahkamah Rayuan dan menolak rayuan terhadap defendan kedua dengan kos:

(1) Berdasarkan kepada autoriti-autoriti, jelas bahawa ujian 'but for' bukanlah ujian yang eksklusif untuk digunakan bagi menentukan penyebab kerugian atau kerosakan. Ujian tersebut boleh diaplikasi tetapi bukan untuk kes-kes di mana terdapat dua atau lebih faktor yang boleh menyumbang kepada kerugian plaintif. Kes ini adalah kes sebegitu di mana keterangan dibuktikan bahawa terdapat beberapa faktor yang boleh membawa kerosakan kepada plaintif. Oleh itu, untuk memutuskan sama ada terdapat penyebaban di dalam keadaan ini, pendekatan sama ada mana-mana tindakan atau kejadian atau faktor ini telah secara material menyumbang kepada kerugian plaintif wajar digunakan. Di dalam kes ini, walaupun gegaran disebabkan operasi kuari yang dijalankan oleh defendan pertama bukan sebab utama, tetapi, selepas beberapa lama, telah menyumbang kepada runtuhan batu yang menyebabkan kerosakan kepada plaintif. Oleh itu, faktor ini bukanlah kecil atau tidak bermakna tetapi adalah sebab yang menyumbang secara material kepada runtuhan batu (lihat perenggan 36–38).

(2) Di atas fakta kes ini jelas bahawa plaintif hampir-hampir dan secara langsung dijejaskan oleh tindakan defendan pertama bahawa defendan

pertama sepatutnya mengambil kira tentang plaintif semasa menjalankan operasi kuari. Setelah membuktikan bahawa defendan pertama mempunyai kewajipan berjaga-jaga terhadap plaintif, perlu diputuskan sama ada defendan pertama telah melanggar kewajipan tersebut. Hakim bicara telah terkhilaf dalam kedua-dua prinsip dan aplikasi fakta apabila beliau menyamakan defendan pertama sebagai profesional dan menggunakan standard berjaga-jaga yang diperlukan oleh penjalan kuari profesional dan kemudian memutuskan bahawa walaupun terdapat kelemahan oleh defendan pertama sebagai penjalan kuari profesional tidak ada pelanggaran kewajipan berjaga-jaga. Di atas fakta defendan pertama bukanlah profesional kerana tidak ada keterangan bahawa dia mempunyai kemahiran sedemikian. Oleh itu, standard berjaga-jaga yang diperlukan adalah standard sebagai seorang yang munasabah dan berhati-hati dan sama ada dia mempertimbangkan aktiviti-aktiviti yang dilakukan oleh defendan pertama sebagai kemungkiran kewajipan berjaga-jaganya kepada plaintif. Di dalam kes ini didapati bahawa meskipun terdapat keterangan yang jelas hakim bicara enggan membuat penemuan bahawa defendan pertama telah melanggar kewajipan berjaga-jaganya dan ini adalah salah arah atas fakta. Operasi letupan yang dilakukan oleh defendan pertama telah menyebabkan gegaran dan walaupun ini adalah salah satu sebab untuk keruntuhan batu ia adalah penyumbang yang penting kepada keruntuhan bukit tersebut, Oleh itu, atas alasan-alasan ini defendan pertama bertanggungjawab kepada plaintif dalam kecuaian (lihat perenggan 39–46).

(3) Defendan kedua telah meninggal dunia dan tidak ada langkah yang diambil untuk menggantikan defendan kedua di dalam prosiding tersebut. Tetapi, walaupun ada pengganti, defendan kedua tidak boleh dikatakan sebagai bertanggungjawab terhadap kerugian yang dialami plaintif kerana defendan pertama adalah kontraktor bebas daripada defendan kedua (lihat perenggan 47–49).]

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 776–790.

Cases referred to

Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 781 (refd)

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, QBD (refd)

Bonnington Casting Ltd v Wardlaw [1956] 1 All ER 615, HL (folld)

Commissioner of Inland Revenue v Maxse [1919] 1 KB 647, CA (folld)

D & F Estates Ltd v Church Commissioner of England [1988] 3 WLR 368, HL (refd)

Donoghue v Stevenson [1932] AC 562, HL (refd)
Fairchild (suing on her behalf) etc v Glenhaven Funeral Services Ltd & Ors, etc [2002] 3 WLR 89, CA (refd)
Lembaga Letrik Negara, Malaysia v Ramakrishnan [1982] 2 MLJ 128, FC (refd)
Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
March v E & MH Stramare Pty Ltd & Anor (1991) 99 ALR 423, HC (refd)
Milligan v Wedge (1840) 12 Ad & El 737 (refd)

Appeal from: Civil Appeal No A-01-64 of 1999 (Court of Appeal, Putrajaya)

Philip Koh (Chan Kok Keong and Norafazli Nordin with him) (Chan & Associates) for the appellant.
NP Ramachandran (Edwin Seibel with him) (NP Ramachandran & Associates) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak):

INTRODUCTION

[1] As this appeal concerns the tort of negligence involving the question of causation, it is appropriate from the outset to set out the facts of the case. In the course of this, for ease of identification we shall be describing the parties in their respective capacity in the proceedings in the High Court.

[2] The plaintiff was the owner of a plant nursery situated on a piece of land known as Lot 37527, in the Mukim of Kampar, Perak ('the plaintiff's land').

[3] The first defendant was an operator of a quarry of a natural limestone hill known as Gunung Tunggal ('the said hill') on a plot of land adjacent to that of the plaintiff. The registered proprietor of this land was the second defendant.

[4] The third defendant was the Director of Land and Mines in the State of Perak who issued a licence to the first and second defendants to remove rock materials from the said hill.

[5] The plaintiff's nursery was situated below the said hill with limestone overhangs above but not directly over it.

[6] On 29 December 1987, at about 6.30am, following a heavy down pour and thunderstorm a large slice of the said hill collapsed causing limestone debris to fall onto the plaintiff's land below and virtually destroying his entire nursery.

[7] The plaintiff alleged that this was due to the quarrying activities of the first and second defendants and permitted by the third defendant. His causes of action against all the defendants were negligence and nuisance. For particulars of negligence the following were pleaded against the first and second defendants:

(a) Failed to develop benches on the quarry face.

(b) Failed to take into account during blasting operations the vertical and horizontal cleavage plane on the limestone formation.

(c) Failed to ensure that there was sufficient drainage system between the hills and the main road.

(d) Failed to ensure that the resultant strength of the ground was adequate to prevent the collapse of the loose eastern duct of the hill.

(e) Failed to adopt proper blasting method.

(f) Failed to take responsible steps to remove the hazards on the hill when they became aware of the said hazardous condition of the hill.

[8] All the defendants deny liability. The second defendant in particular also pleaded in the alternative that the injury suffered by the plaintiff was caused by the negligence of the first defendant who was an independent contractor engaged by him to operate the quarry.

[9] The plaintiff's expert witness, a mineral and metallurgical engineer, PW1 attributed the cause of the collapse of the said hill on the particular day to a force known as 'rockburst' which was caused directly by the quarry operation operated by the first defendant. He supported this with a written report which was tendered in court.

[10] To summarise his opinion, we shall adopt the description provided by the trial judge:

> He explained that the vibration from the quarry operation on the west face (opposite face) of the hill had caused sound, debris and reaction to the rock on the eastern face (ie where the overhang facing the plaintiff's land was) in the following manner:
>
> The sound waves will travel through the air as a wave train and the strongest at the source of blast and when the wave train hit an obstacle it can cause damage to it. From the centre of the blast there is also a rock wave travelling through the rock and when it hit the eastern face the wave move back to the west face until it spent itself. When the rock wave meets the fault the total energy is stored in the rock face before the fault thus giving a different distribution of energy within the rock. As such the faults are not only unstable but become energised. The way blasting affects the rock is like adding weight to a spring. When the weight is removed the spring goes back to its original position but after prolonged tension the spring becomes deformed and

eventually breaks. The same principle applies to rock. The case of Gunung Tunggal the quarry effectively narrowed the deformed zone so much so the east face became a deformed zone and in its release of energy the rock bust out.

[11] The first defendant called two experts to dispute PW1's theory. The first (DW1) was a former consultant geologist and the second (DW2) was the government geologist attached to the Geological Survey Department of Malaysia and who was assigned by the authorities to investigate into the cause of this incident.

[12] DW1 distinguished the difference between a rockburst with a rockfall. He is of the opinion that the collapse of the said hill was due to a rockfall and not a rockburst. A rockburst according to him, and supported by authoritative text, is a sudden and often violent breaking or an expulsion burst of a mass of rock caused by very rapid or instantaneous release of accumulated strained energy in a highly stressed rock and this is often displayed by the projection of broken rock into the opening accompanied by ground tremour, rockfalls and air concussion. A rockburst is not likely to occur unless at a depth of 1000 meters (about 3000 feet) below ground surface. A rockfall on the other hand is the 'relatively free falling or precipitous movement of newly detached segment of bedrock (usually massive homogeneous or joint of any size) from a cliff or other very steep slope. It is the fastest moving landslide and is most frequent in mountain areas and during spring when there is repeated freezing and thawing. Movement may be straight down, or a series of leaps and bounds down the slope; it is not guided by an underlying slip surface'.

[13] DW2 agreed with the opinion of DW1 that the cause of the collapse of the said hill was due to a rockfall and not a rockburst. He was at the scene barely 2 hours after the incident and observed at the material time as well as subsequently that faults had existed on north south line of the said hill and there were unstable overhangs on both the southern and eastern face ie that facing the plaintiff's land. He then said that the overhangs came about by fluctuation of sea level or by rain water erosion over a period of time undercutting the base of the hill and because of this undercutting at the base, the top part of the hill lost its vertical support.

[14] As to the cause of the collapse, DW2 proffered:

> Due to chemical composition of limestone, weathering along planes of weakness such as shears, joint faults, is a natural long term process of denudation on the limestone hills. The coercive strength over these planes of weakness is reduced and subsequently fails to support the rock slabs or blocks, thus giving rise to a rockfall.
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> Apart from the geological factors mentioned above, a number of secondary causes could also have hasten (sis) the rock fall and they are:

A (a) Incessant rain which can loosen the rock mass

(b) Vibration caused by blasting in the quarry

... The incessant rain for the past few months reduced further the cohesive strength between the parent cliff and the overhang. The regular vibration cause by the blasting activities in the quarry about 50 to 100 meters away further aggravated the situation and on the morning of 29th December 1987, the supporting forces holding the overhang gave way.

[15] As observed by the trial judge, DW2 on 'being cross-examined he agreed that he had never ruled out vibration from blasting could have caused the collapse but maintained that the primary cause was attributable to natural causes'.

FINDINGS BY THE HIGH COURT

[16] Against the evidence adduced on the issue of liability (since it was agreed that quantum will only be assessed after liability is decided and ascertained) the trial judge first set out the requirement of the law: it is upon the plaintiff to prove that the defendant's act was the causa causans (the effect cause) of the injury suffered by the plaintiff. He then adopted the 'but for' test to determine the effective cause. He used a passage found in paras 2–10 of the authoritative text of *Clerk & Lindsell on Tort* (17th Ed) to explain this principle:

Test of causation: the 'but for' test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage. It has been said that the law seeks the *causa causans* (effective factor) rather than the *causa sine qua* non (factor (s) without which the damage could not have been occurred). In pursuit of the sometimes elusive effective cause the test commonly propounded is the famous (or infamous) 'but for' test. Would the damage of which the plaintiff complains have occurred 'but for' the negligence (or wrong doing) of the defendant? Or to put it more accurately, can the plaintiff adduce evidence to show that it is more likely than not, more than 50 per cent probable, 'but for' the defendants wrongdoing the relevant damage would not have occurred.

[17] Having set out the law, the trial judge then proceeded to evaluate the evidence of the experts from both sides. He was convinced that a rockburst is different from a rockfall. And considering the collapse did not occur when the quarry was in operation but six days after it was shut down for the New Year holidays, PW1's postulation of a rockburst due to the quarry operation is unacceptable. It would, in the trial judge's view 'be tenable only if the collapse had occurred while quarrying was in progress at the time, but not when the quarry was not in operation'. As to the evidence of DW2, the trial judge has this to say:

> On the other hand the population of Mr Chow Weng Sum (DW2) was fairly straight forward, firm in reasoning and is consistent with the fact that the collapse occurred while the quarry was not in operation. It was also a product of a very careful and unbiased and independent study commissioned by the government department which commenced only hours after the collapse and obviously undertaken without any forethought of litigation.
>
> Having found Mr Chow's evidence as more acceptable, I must conclude that the collapse was less likely to have been brought about by any sudden release of stored energy described as rockburst then by the call of gravity on the inherently instable (SIS) hill, a process described as rockfall by Mr Chow Weng Sum.
>
> I am therefore unable to come to a finding that the causa causans of the collapse of the hills was the vibrations from the operation of the first defendants quarry. The fact that it may be a contributory cause is not enough — it must be the prime cause as *Vermont & Rivers and Ors v Prye River Dock Co Ltd* had ruled. Neither would a mere possibility suffice as the case of *Guan Soon Tin Ming* and *Sundram v Arujunam & Anor* had decided.
>
> On this ground alone, the plaintiff's claim would have failed.

[18] The trial judge then proceeded to strike out the plaintiff's claim against the first defendant. The claim of the second defendant was also dismissed but for these reasons:

> the claim against the second defendant which it is clear had been made a party only because he was the owner of the land and the holder of the permit to remove rock materials which was issued by the third defendant. The same particulars of negligence had been pleaded against the second defendant as they were against the first defendant. It is abundantly clear that the second defendant was not the operator of the quarry and could not have been responsible for the omission mentioned in the particulars. He had leased out the land for the purpose of a quarry to the first defendant in 1982 and was therefore not the occupier of the land at the time of the accident.

[19] The claim against the third defendant was also dismissed. There is no necessity for us to elaborate the reasons for this as the plaintiff did not appeal against this decision of the High Court.

[20] Thus, this appeal before us is only confined to the first and second defendants.

QUESTION POSED TO THE FEDERAL COURT

[21] It is on the application of this principle of 'but for' test to the facts of this case that the plaintiff is taking issue in this appeal for which leave was granted by this court to pose this question before us:

> Whether in a negligence action where there are overlapping factors causing harm to a plaintiff, the test to be employed is that as pronounced by the House of Lords in *Bonnington Casting Ltd v Wardlaw* [1956] 1 All ER 615 referred to by the Federal Court in *Lembaga Letrik Negara, Malaysia v Ramakrishnan* [1982] 2 MLJ 128 and not the 'but for' test.

DECISION OF THE COURTS BELOW

[22] To complete the narration of what occurred in the High Court subsequent to the trial judge's finding that the effective cause of the damage to the plaintiff was not due to quarry operation, the trial judge nonetheless proceeded to determine whether the first defendant has breached its duty of care to the plaintiff on the assumption that the *causa causans* is established. On the breach of duty of care, the trial judge concluded:

> Without any evidence of what a reasonably competent operator would have done under the circumstances, I am not in a position to make any assessment whether the first defendant had been careless in operating his quarry and in failing to take such remedial measures.
>
> Notwithstanding the opinion of the mining engineer on the short-comings of the operator, I cannot come to any conclusion that he had breached his duty of care.

[23] As regards to the cause of action for nuisance against the first defendant, the trial judge dismissed it by saying that 'having failed to prove conclusively that the collapse of the hill was caused by the quarrying operation of the defendant, it follows that he would also fail in nuisance'.

COURT OF APPEAL

[24] The Court of Appeal after repeating what was disclosed by the trial judge in his grounds of judgment added nothing of any substantial value except by affirming the decision of the High Court. Regarding the claim against the first defendant and relevant to the question posed to us, the Court of Appeal can only manage this:

> The learned judge made a very comprehensive consideration of the facts relating to this matter and had given a thorough and careful evaluation of the evidence of the witnesses especially those expert witnesses and their reports. He had also given adequate reasons in his finding of facts and application of the laws of negligence and nuisance to the facts of the case. We totally agree with him.

ARGUMENT OF THE PLAINTIFF IN THIS APPEAL

[25] According to the plaintiff, the trial judge has applied a wrong principle

of law regarding the causation to the damage done to the plaintiff. Counsel for the plaintiff elaborated by saying that when there are overlapping factors like in this instant case, the 'but for' test should not be applied. The undeniable overlapping factor here is the vibration caused by the quarry operation conducted by the first defendant. According to the plaintiff, this was admitted by DW2, whose testimony was accepted, believed and relied upon by the trial judge. The following are the relevant parts of DW2's evidence on this subject:

> Apart from the geological factors mentioned above, a number of secondary causes could also have hastened the rockfall and they are:
>
> (a) incessant rain which can loosen the rock mass
>
> (b) vibrations caused by blasting in the quarry …
>
> Regular vibrations caused by the blasting activities in the quarry about 50 to 100 meters away further aggravated the situation.

[26] Again in cross-examination DW2 admitted:

> (a) I have never ruled out that vibration such as blasting could have caused the collapse;
>
> (b) blasting could cause the vibration, but whether it is sufficient to hasten the rockfall depends on the intensity of the vibration which in turn depends on the amount of charge being applied;
>
> (c) Intensity of the blasting would be a factor on the magnitude of vibration. Frequency of blasting will cause more number of times of vibrations. There was a tendency to disturb the equilibrium of the hill each time there was a vibration … if you have an overhang and an undercut on one side of the hill and there was blasting on the other side near enough — the vibration may enhance the chances of a rockfall. It may hasten the rockfall … I did not investigate the manner of the quarrying.

[27] It is the argument of the plaintiff that in a situation such as this, when there are overlapping factors, the correct test to be applied is that stated in the case of *Boonington Casting Ltd v Wardlaw* and referred in the Federal Court case of *Lembaga Letrik Negara, Malaysia v Ramakrishan* both of which will be discussed by us in due course.

THE FIRST DEFENDANT'S STAND

[28] It is the view of the first defendant that if the principle in *Bonnington Casting Ltd v Wardlaw* described by the first defendant as 'whatever that caused the injury and damage must have materially contributed to the damage' then 'every single incident of alleged (negligence) would find someone liable even if

it is proven that that someone was not negligent in his actions'. Further, as *Bonnington Casting Ltd v Wardlaw* rules that whatever that caused the injury and damage must have materially contributed to the damage it 'cannot be a causal connection but evidence should be forwarded to identify material contribution which resulted in the injury and damage'.

[29] Next, the first defendant turned to the fact that though the rockfall could be due to various reasons, the primary cause 'was (the) heavy weathering continuous rainfall over a period with inherent defects and not blasting as quarrying activities were stopped well over a week before the rock fall'. In short, the first defendant's contention is that though there were several factors contributing to the rockfall but the plaintiff has failed to identify quarrying by the first defendant as the one which was materially responsible for the cause.

ANALYSIS

[30] For the plaintiff to succeed in a claim for negligence, it is essential for him to prove among others that the injury caused to him was due to the defendant's negligence. There must be link between the wrongdoing and the damage caused. The burden of proving this link is upon the plaintiff — see *Bonnington Casting Ltd v Wardlaw*. In establishing this link between wrongdoing with injury there can be other possible causes. In such a situation, some courts have adopted the 'but for' test. Here the approach is not to indentify all of the possible causes of a particular incident but focus on the effective cause of the resulting damage in order to assign responsibility for that damage caused. As confirmed by the authoritative text of *Clerk & Lindsell on Tort* (17th Ed) at paras 2–12, in majority of the cases this 'but for' test in practice operates well. But in situations where there are combined causes or several causes contributing to the wrongdoing then this 'but for' test may not be a satisfactory approach to determine causation. To deal with this, Lord Reid in *Bonnington Casting Ltd v Wardlaw* enunciated:

> It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* (the law does not concerns itself with trifles) is not material, but I think that any contribution which does not fall within that exception must be material.

[31] This statement is made in the light of these facts: The plaintiff had worked for eight years in a foundry producing steel castings. He contacted pneumoconiosis through inhaling the air in the foundry which contained silica dust. A source of the dust came from pneumatic hammers, one which was operated by the plaintiff. The defendant did not provide any protection to the plaintiff against this. But there were also dust which polluted the factory

coming from operations conducted at swing grinders in the foundry. The ducts of the dust-extraction plant for these grinders were not kept free from obstruction as required by a statutory regulation. The defendant admitted that they were in breach of this regulation but maintained that there was no evidence adduced by the plaintiff to show that the noxious dust in the general atmosphere of the foundry came more from the pneumatic hammers than the swing grinders.

[32] The principle declared by Lord Reid in *Bonnington Casting Ltd v Wardlaw* was applied (rather than adopted) by this court in the case of *Lembaga Letrik Negara, Malaysia v Ramakrishnan*. This arose from the judgment of Raja Azlan Shah CJ (as His Royal Highness then was) who declared:

> The fact that the respondent climbed the pole, a fact on which the appellants counsel much relied to show that the effective cause of the accident was the deliberate act of folly by the respondent, and therefore, the breach of duty by them had not 'caused or materially contributed to his damage' (per Lord Reid in *Bonnington Casting Ltd v Wardlaw*) cannot avail the appellants in view of the evidence. To place the dangerous pole there is to subject him to temptation and the risk of injury. The respondent action in climbing the pole can afford no excuse to the appellants when it was found that the pole is within easy reach of children and ideally suited for them wishing to climb it and that it was prudent to put up warning signs or anti-climbing device.

[33] In another Federal Court case of *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, the principle in *Bonnington Casting Ltd v Wardlaw* was again referred to but in this context:

> From the passage cited above, it would appear that Mr Abraham was of the view that the causa causans merely meant an effective cause. It has been held that such an expression should be avoided as the issue of causation does not necessarily turn upon it: (see *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1992] 2 AC 22 at p 29). Causation is a matter to be determined by common sense and what the law regards as fair, just and reasonable in the circumstances of a particular case (see *Fairchild (suing on her behalf) etc v Glenhaven Funeral Services Ltd & Ors, etc* [2002] 3 WLR 89; *March v E & MH Stramare Pty Ltd & Anor* (1991) 99 ALR 423 at p 429). The relevant question is whether the acts and/or omissions of a particular defendant made a material contribution to the harm suffered by the plaintiff (see *Bonnington Casting Ltd v Wardlaw* [1956] AC 613 at pp 620 623; *Nicholsons & Ors v Atlas Steel Foundry & Engineering Co Ltd* [1957] 1 WLR 631 at p 624; *Fairchild (suing on her behalf) etc v Glenhaven Funeral Services Ltd & Ors, etc*; *Chappel v Hart* (1998) 156 ALR 517 at pp 524–524).

[34] The above seems to be the approach of the courts when faced with the question of causation from two previous employers of the plaintiff or events,

acts or factors which may have attributed to the wrongdoing that caused the plaintiff's injury and damage. In these circumstances, the 'but for' test was departed. This is again reflected in House of Lords decision in *Fairchild (suing on her behalf) etc v Glenhaven Funeral Services Ltd & Ors, etc* where it is stated that in certain special circumstances the court could depart from the usual 'but for' test of causal connection and treat a lesser degree of causal connection as sufficient, namely that the defendant's breach of duty had materially contributed to the cause of the claimant's disease by materially increasing the risk of the disease being contracted. And in the circumstances of this case where the plaintiffs had worked with different employers at different times were exposed to inhaling asbestos dust which might caused mesothelioma, it would be just and in accordance with common sense to treat the conduct of both the previous employers in exposing the plaintiff to such risk to which he should not have exposed as making a material contribution to the plaintiff contracting the disease.

[35] In an Australian case of *March v E& MH Starmare Pty Ltd* where the facts are these: the plaintiff has sued for personal injuries sustained when his car ran into the rear of a truck owned by the first defendant which was parked in the centre of a street by the driver, the second defendant, when he was loading goods into the premises of the first defendant, the High Court of Australia has this to say on the 'but for' test:

> The 'but for' test gives rise to well known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test 'gives the result, contrary to common sense, that neither is a cause': *Winfield and Jolowicz on Tort* (13 Ed, 1989), p 134. In truth the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury: see, for example, *Chapman v Hearse* (1961) 106 CLR 112 *Baker v Willoughby* [1970] AC 467; *McGhee v National Coal Board*; *M'Kew* (to which I shall shortly refer in some detail). The cases demonstrate the lesson of experience, namely that the test, if applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and infusion of policy consideration. That in itself is something of an irony because the proponent of the 'but for' test have seen it as a criterion which would exclude the making of value judgments and evaluative considerations from the causation analysis: see Weinrib *A Step Forward in Factual Causation* (1975) 38 Modern Law Review 518 at p 530.

The High Court of Australia then accepted the recognition that concurrent or successive tortuous acts may each amount to a cause of the injuries sustained by a plaintiff as reflected in the proposition that it is for the plaintiff to establish that his or her injuries are 'caused materially contributed to' by the defendant's wrongful conduct.

[36] In the light to these authorities, we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in *Bonnington Casting Ltd v Wardlaw*: whether any of these acts or events or factors has materially contributed to the plaintiff's injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: 'contribution which comes within the exception of *de minimis non curat lex* (the law does not concerns itself with trifles) is not material.'

[37] By this we have answered the question posed to this court in the positive.

[38] Now returning to the facts of this case, we agree that from the evidence adduced and as disclosed, there are indeed multiple factors which contributed to the plaintiff's injury. The question is whether the operation of the quarry by the first defendant which included regular blasting of the rocks from the said hill is a material contribution to the plaintiff's injury. As the High Court has not applied its mind to this issue but instead misdirected itself to applying the 'but for' test, it encumbers upon us to deal with this. As stated, this is a case of a combination of a number of material factors contributing to the plaintiff's injury. Vibration from the operation of the first defendant's quarry that caused the collapse of the said hill is one of them. Though not a primary cause, this factor ie the vibration caused by the quarry operation carried out by the first defendant over time has materially contributed to the rockfall which caused the plaintiff's injury. This factor is neither trivial nor insignificant. It is a material contribution. Though DW2 has stated that the vibration is not the primary cause but in our view it is a cause which has materially contributed to the rockfall.

[39] Having now established that there is causation by the first defendant to the plaintiff's injury, the next question is whether there is a duty imposed upon the first defendant to the plaintiff to prevent such injury. For this we return to the celebrated dictum of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 which states:

> The rule that you are to love your neighbours becomes in law, you must not injure your neighbour; and the lawyers question, who is my neighbour? received restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my

A neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

B **[40]** The trial judge did not address this point even though he has stated that 'even assuming that the causa causans is established, the plaintiff must prove on the balance of probability that the first defendant has breached his duty of care'. He seems to have accepted that the first defendant owes to the plaintiff a duty of care even if causation between the act and the plaintiff's injury is proven.
C Based on the facts of this case we do not dispute this. We find that the plaintiff was so closely and directly affected by the first defendant's act that the first defendant ought reasonably to have the plaintiff in contemplation when operating the quarry in the said hill.

D **[41]** Having established that the first defendant owes the plaintiff a duty of care, the next question is whether the first defendant has breached that duty. On this, the trial judge gave a lengthy exposition as to why such duty of care was not breached. He first found that in order to operate a quarry one requires 'skill and competence in this field'. For this, he equates the first defendant to a
E professional and applied a standard of care required of a professional quarry operator as expounded by McNair in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at p 586:

F Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of a man on the top of the Claphan omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of the ordinary
G competent man exercising that particular art.

[42] He then demanded that 'it is incumbent upon the plaintiff to establish what the standard should have been'. Following from this, he said that 'while the mining engineer had expressed an opinion that the quarry was developed in
H a manner that had exposed the maximum danger to the plaintiff's land and that the operator had failed to take remedial measure that would prevent the collapse of the hill, no evidence was forthcoming with regard to the standard of care that was required of a reasonably competent operator so as to enable the court to reach a finding whether the first respondent (first defendant) had
I breached his duty of care'. He then concluded that 'without any evidence of what a reasonably competent operator would have done under the circumstances, I am not in a position to make any assessment whether the first defendant had been careless in operating his quarry and in failing to take such remedial measurers'. Reiterating further, he said 'Notwithstanding the opinion

of the mining engineer on the shortcomings of the operator, I cannot come to any conclusion that he (first defendant) had breached his duty of care'.

[43] Respectfully, we do not agree with the trial judge on both principle and application of facts. First, we cannot accept that the first defendant is a professional. Though there is no conclusive definition of a professional we are minded to adopt the guidelines set down by Scrutton LJ in *Commissioner of Inland Revenue v Maxse* [1919] 1 KB 647 at p 657 when he said:

> [A] 'profession' in the present use of the language involves the idea of an occupation required either purely intellectual skill, or manually skilled controlled, as in a painting or sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for sale of commodities.

[44] A quarry operator may acquire the skill to operate a quarry by learning the techniques and procedures and using his manually skilled controlled. But before he can be considered for the purpose of professional liability, there must be evidence that he possesses such skill. In this instance, the first defendant is a private limited company. It could not have operated the quarry except through its servants and/or agents. They could be professionals belonging to the traditional professions in this field such as civil engineers or mining engineers or those who had acquired manually skilled controlled. But this is not the situation here. The person who operated the first defendant's quarry was DW3. He testified that he is a director of the first defendant but possesses no technical qualification to operate a quarry. He was operating the first defendant's quarry for five years prior to the incident and before this 'was not involved in any other quarry operation'. Though he was, at the time of the trial, a registered 'shot fire' (a person who design the blasting operation) he did not have such a permit when he operated the quarry. The reason for this was that there was no requirement imposed by the authorities. But in our view the work carried out by DW3 as described, at best, will only qualify it as an occupation. The job was substantially a manual one which could be acquired by anyone after receiving some instructions. It has not reached a level of sophistication to be classified as an occupation. Further, there is no body or establishment for those who are engaged in this kind of work to be a member. Such organisation is necessary to regulate its members and to maintain the integrity of their work. Such basic requirements are totally absent in this case. The trial judge in our opinion should not have placed the first defendant on the pedestal of a professional.

[45] Since the first defendant is not a professional, the standard of care required of it must be considered in the circumstances of the type of activities it was engaged in. In such circumstances, the objective standard must relate to the type of activity rather than the category of actor which the first defendant

belong. This objective standard of care must be considered in the light of what is illustrated by Baron Alderson in *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 at p 748 as:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinary regulate the conduct of human affairs, would do; or do something which a prudent and reasonable man would not do.

[46] What follows is whether a reasonable and prudent man as described considers the activities carried out by the first defendant as a breach of its duty of care to the plaintiff. On this, despite overwhelming evidence which were accepted by the court, the trial judge has refused to come to a finding that the first defendant has breached this duty of care. This is a misdirection on facts. Having perused the evidence ourselves we are of the view that though the first defendant had used minimal amount of explosive for blasting and adopted certain safety blasting method nevertheless had neglected to ensure that the resultant strength of the ground was adequate to prevent the collapsed of the eastern duct of the hill and to take reasonable steps to remove hazards on the hill when they were aware of them. The blasting operation carried out by the first defendant had caused vibration and though this is one of the causes for the rockfall it is a significant contribution to the collapse of the eastern duct of the hill. On these grounds, we find that the first defendant is liable to the plaintiff for negligence. Accordingly, this appeal against the first defendant should be allowed.

[47] With regards to the second defendant, we are surprised that there is virtually no mention or reference of him in this appeal. The plaintiff seems to have left him out entirely. Perhaps, this may be due to the fact that the second defendant has passed away when the trial in the court of first instance commenced. His death was brought to the attention of the trial judge and this is what was recorded from the testimony of DW5 who claimed to be his son:

> Bapa saya Darus Mohd Said adalah tuan punya berdaftar surat hakmilik. Beliau telah meninggal dunia selepas kejadian rockfall. Saya hadir sebagai wakil harta pusaka bapa saya.
>
> (Translated: My father is Darus Mohd Said, the registered owner of the land. He has passed away after the rockfall. I am present as an administrator of my father's estate.

[48] Despite this disclosure, we find no effort or step taken by the parties to substitute the second defendant in the proceedings. Even accepting that there was substitution, on the evidence as disclosed, we agree with the courts below that the second defendant cannot be held liable for the injuries sustained by the plaintiff. Our reasons differ slightly from that of the trial judge. We are of the view that the first defendant was an independent contractor of the second

defendant. This is supported by the unchallenged testimony of DW3, a director and sole representative of the first defendant who said:

> the owner of the land (the second defendant) did not participate in the quarry operation. We were operating independently of the owner.
>
> I paid the land owner a monthly sum of RM700/-. There was no written agreement Fixed amount of RM700/-.

[49] As an employer is not responsible for any tort committed by an independent contractor in the course of the execution of the works (which is the pleaded case of the second defendant) unless there are evidence to indicate otherwise — see *Milligan v Wedge* (1840) 12 Ad & El 737; *D & F Estates Ltd v Church Commissioner of England* [1988] 3 WLR 368, and there being none in this case, the second defendant cannot be held liable to the plaintiff for the negligence of the first defendant. Accordingly, this appeal against the second defendant must be dismissed.

CONCLUSION

[50] In conclusion, we:

(a) allow this appeal against the first defendant with costs here and below;

(b) dismiss this appeal against the second defendant with costs;

(c) set aside the orders of the High Court and the Court of Appeal granted in favour of the first defendant;

(d) order the senior assistant registrar of the High Court to assess damages suffered by the plaintiff and thereafter to be paid by the first defendant to the plaintiff;

(e) order the deposit for this appeal to be refunded to the plaintiff.

Appeal against first defendant allowed with costs here and below and appeal against second defendant dismissed with costs.

Reported by Kohila Nesan